STEPHEN L. SAVARESE
ATTORNEY AT LAW
attystephensavarese@gmail.com

Newtown Office:
Phone: (203) 270-1144
FAX: (203) 270-0077
103 South Main Street
Newtown, CT 06470

Middlebury Office:
Phone: (203) 758-8645
P.O. Box 7
Middlebury, CT 06762

February 19, 2015

Energy and Technology Committee
State of Connecticut
Legislative office Building, Room 2E
Hartford, Connecticut

Re: Testimony on behalf of the Town of Middlebury – Raised Bill No. 566
An Act Concerning Electric Generating Facilities

Greetings:

My name is Attorney Stephen Lawrence Savarese. I live at 777 Breakneck Hill Road, Middlebury, CT. I represent and appear today before you on behalf of the Town of Middlebury in support of Proposed Senate Bill No, 566 introduced by Senator Hartley of the 15th Senatorial District.

The Town of Middlebury has a unique perspective of having participated fully in the process established by statute for the review and approval before the Connecticut Siting Council of an Electric Generating Facility from its inception in 1998 through pending proceeding. For many different reason over the past 17 years the particular facilities as reviewed and approved has not been constructed. For purposes of brevity in my remarks, , but in order to fully appreciate the detailed in the history of the prior proceeding, I have attached to my statement as Exhibit A the chronology of the proceedings recently reviewed and set forth in a Petition to Modify by Attorney Philip Small on behalf of his client CPV Towantic LLC, the current Certificate Holder for the 512 Mega-watt natural gas and oil fired facility located in the northwest corner of Oxford Connecticut abutting the Town of Middlebury and Borough of Naugatuck.

Connecticut General Statutes Section 16-50, provides the Connecticut Siting Council a detailed process including the criteria for the review and participation of interested parties. However, the process lacks an expiration date for the approvals. The Connecticut Siting Council has routinely mandated deadlines for the construction of approved facilities but also regularly granted extensions. The initial challenge to the process on the Towantic Energy approval granted in 1999 was submitted to the Connecticut Siting Council as Petition 802. The full Decision of the Siting Council is provided as Exhibit B. The Council referenced its authority to provide conditions at Connecticut General Statutes Section 16-50p(a)(1) for the authority to create a type of rolling approval in the prefatory clause "Unless otherwise

approved by the Council" a caveat to the express deadline that states "this Decision and order shall be void if all construction authorized herein is not completed within four years of the effective date of this Decision and order or within four years after all appeals to this Decision and order have been resolved."

The Town of Middlebury with others appealed the Decision in Petition 802 to the Superior Court in the cased captioned Town of Middlebury v. Connecticut Siting Council (Docket HHB CV07-4013143) which reviewed the statutory framework and concluded,"[i]ndeed, because the council apparently has the greater power to issue a certificate with no deadline al all, it surely has the lesser power to issue a certificate based on the condition that the applicant complete the project by a certain deadline "unless otherwise approved by the Council." The full memorandum of Decision is provided as Exhibit C. That was more than 7 years ago and the Towantic Energy project is again seeking an extension of the last deadline schedule to expire in 2016 through 2019. There is currently no legal authority to prevent the Certificate Holder to seek further extensions after 2019 – more than twenty years after the project was proposed.

Accordingly, on behalf of the Town of Middlebury I urged that an expiration to Certificates be enacted in the approval process. I undertook to draft proposed legislation to address a known problem narrowly enough to meet the intent and not prohibit reasonable foreseeable flexibility. The certainty that a power plant if approved will be built as proposed in the timeframe promoted so as to allow for the local citizens, officials, and businesses to make necessary accommodations is the driving purpose here.

I have tracked the language on the expiration of subdivisions found at Connecticut General Statutes section 8-26c(d). I have also limited the scope by tracking the most recent statute related to Electric Generating facilities adopted safety requirements after the Kleen Energy plant explosion in Middletown at Connecticut General Statutes section 16-50ii.

I originally proposed the following:

> **Electric generating facility: Expiration of Certificates.** On or after October 1, 2015, a certificate to build a facility described in subdivision (3) of subsection (a) of section 16-50i shall expire not more than three years from the date of such approval, unless the Connecticut Siting Council establishes an earlier date. The Connecticut Siting Council may grant one or more extensions of time to complete all or part of the work in connection with such certificate, provided the time for all extensions under this subsection shall not exceed seven years from the date the certificate was granted. If the certificate holder or his successor in interest submits evidence to the Connecticut Siting Council that completion of the project was delayed because of a state or federal construction project, the certificate shall expire not more than seven years from the date the Connecticut Siting Council concurs on the cause of the delay and may grant a further extension of time to complete all or part of the work in connection with such certificate, provided the time for all extensions shall not exceed ten years from the date the certificate was initially granted at that site. If the certificate holder or his successor in interest prevails in an appeal of a decision of the Connecticut Siting Council under section 16-50q, the expiration date of the certificate shall be tolled for the time of such

appeal and such other action of the Connecticut Siting Council in accordance with the judicial decision.

I conclude my remarks by stating any effort to curtail the process of a rolling approval with unlimited extensions is needed and would avoid the appearance of unfettered approvals to the electric generating industry.

Sincerely,

Stephen L. Savarese

Attached

Exhibit A – Chronology of Towantic Energy

Exhibit B – CSC Decision on Petition 802

Exhibit C – Memorandum of Decision (Schuman, J)
Town of Middlebury v. Connecticut Siting Council
(Docket HHB CV07-4013143)

Exhibit A

II. PRIOR COUNCIL PROCEEDINGS

On June 23, 1999, the Council issued the Decision authorizing the construction, operation and maintenance of the Facility. Notably, in its Findings of Fact, the Council found that "Connecticut is expected to need [additional capacity] to maintain reliability of the state's bulk power system . . . ." Findings of Fact, ¶ 13. Further, the Council determined that the Facility "would help reduce dependence on large nuclear and older, more polluting fossil-fueled generators . . . and reduce certain air emissions compared to existing fossil-fueled electric generators." *Id.*, ¶ 15. An appeal from this Decision was dismissed by the Superior Court. *Citizens for the Defense of Oxford v. Connecticut Siting Council,* 2000 WL 1785118 (Conn. Superior Ct. Nov. 14, 2000).

On March 1, 2001, the Council issued a Decision ("2001 Decision") approving Towantic's Development and Management Plan ("D&M Plan") and denying a petition for declaratory ruling (Petition No. 492) filed by opponents of the Facility. The Council noted that Towantic had "compacted and shifted some facility components up to 265 feet further south and lowered the elevation of the facility's footprint . . . ." 2001 Decision, page 1. The Council further found that the Facility "will displace older plants to improve both state and regional ambient air quality and the health of Connecticut residents." 2001 Decision, pages 3-4. The Council's 2001 Decision was appealed unsuccessfully to the Superior Court. *Town of Middlebury v. Connecticut Siting Council, 2002 WL 442383* (Conn. Superior Ct. Feb. 27, 2002).

Since the Council granted the Certificate and approved the D&M Plan, a number of events have transpired that have delayed the completion of the Facility beyond the original construction deadline of May 29, 2005. Opponents appealed the Department of Energy and Environmental Protection's (the "DEEP") June 26, 2003 issuance of the air permits to construct and operate the Facility. Due to the appeal, the Council extended the deadline one year until June 26, 2006, to allow resolution of the appeal. *See Council Letter to Alan M. Kosloff, March 9, 2004*; *see also, Town of Middlebury v. Department of Environmental Protection,* 283 Conn. 156 (2007) (affirming Superior Court dismissal of appeal.)

In late 2005, Towantic sought to reopen Docket No. 192 to eliminate the dual-fuel capability requirement and to extend the construction deadline indefinitely to permit Towantic to secure financing. On November 17, 2005, the Council denied Towantic's request but reopened Docket No. 192 under Conn. Gen. Stat. §4-181a(b) on its own motion to consider whether changed conditions warranted a modification of the Certificate. However, in December 2005, Towantic's parent company, Calpine Corp., filed for bankruptcy protection, and the Council's proceeding was suspended by the Bankruptcy Code's automatic stay provision.

The bankruptcy court subsequently granted relief from the automatic stay, and the Council scheduled a hearing in the reopened docket for July 25, 2006. At the same time, the Council extended the deadline 90 days until September 26, 2006, to provide time for the Council to deliberate on the issue of changed conditions. *See Council Letter to Alan M. Kosloff, March 18, 2006.*

On August 22, 2006, Towantic notified the Council that General Electric Energy Financial Services ("GE EFS") was in the process of acquiring Towantic. To allow time for due diligence, Towantic requested and the Council approved a 120-day extension until January 24, 2007. *See Council Letter to Alan M. Kosloff, Sept. 7, 2006.*

On January 4, 2007, the Council issued Findings of Fact in the reopened Docket No. 192 and rendered an Opinion concluding that "the stated changed conditions, as outlined in the Council's hearing notice, alone or cumulatively, are not sufficient to modify or otherwise reverse the Council's 1999 final decision granting the Certificate." On that date, the Council also rejected Petition No. 802 filed by opponents of the Facility. The rejected petition requested "that the Council rule that its prior extensions were void, and, since the power plant has still not yet been built, the Certificate has expired." *Petition No. 802, Decision, page 1.* An appeal from the

Council's ruling was dismissed by the Superior Court. *Town of Middlebury v. Connecticut Siting Council,* 2007 WL 4106365 (Conn. Superior Ct. Nov. 1, 2007). In light of its opinion on changed conditions and GE EFS's pending acquisition of Towantic, the Council extended the construction deadline four more years until January 24, 2011. *See Council Letter to Alan M. Kosloff, Jan. 22, 2007.*

On October 20, 2010, Towantic sought a further extension of time to secure financing through a long-term power purchase agreement ("PPA"). In its request, Towantic stated that it had achieved a number of project milestones including completion of environmental permitting, execution of a large generator interconnection agreement, and selection of an engineering, procurement and construction contractor. Further, Towantic stated:

> "...we believe it is evident that no project can go forward to construction without a long-term power purchase agreement with one or more of Connecticut utilities. Since 2001, ISO-New England's 'forward capacity market,' which was to provide the revenues on which a project could rely to cover its fixed costs, has collapsed to 10-20% of the levels initially predicted." Towantic Letter to Chairman Caruso, October 20, 2010, page 2.

Towantic further noted that, in reviewing the 2010 Integrated Resource Plan, the Department of Public Utilities Control (now Public Utilities Regulatory Authority) concluded that "no further capacity resources will be required in Connecticut over the near term." *Id.* Notably, this conclusion was made after the capacity and peaking units procurements mandated by Public Act Nos. 05-01 and 07-242, which resulted in over 1,200 MW of projects approved by the Council in Docket No. 225 (Kleen Energy) and in Petition Nos. 831 (Waterbury Generation), 836 (Waterside Power), 843 (GenConn Devon), 875 (GenConn Middletown) and 925 (PSEG New Haven). At the time, Towantic remained "optimistic that PPA opportunities will be available in the reasonably near future" and stated that extending the certificate would allow Towantic to participate in any future procurement process. *Id.*, page 3. Based on this request, the Council

extended the construction deadline under the Certificate until June 1, 2016. *See Council Letter to Vimal Chauhan, Nov. 8, 2010.*

In 2011, the Council modified its decision in Docket No. 192 in response to the 2010 gas explosion at the Kleen Energy Plant in Middletown. *See Docket NT-2010, Reopening of Final Decisions Pursuant to C.G.S. §4-181a(b).* The Council, on its own motion, reopened the final decisions of all jurisdictional natural gas-fired power plants, including Docket No. 192, pursuant to Conn. Gen. Stat. §4-181a(b) to consider the recommendations contained in the reports issued by Kleen Energy Plant Investigation Review Panel and the Thomas Commission. *Id.*, Opinion, March 17, 2011, page 5. The Council concluded that "changes in industry practice standards specifically pertaining to the gas pipe cleaning process" constituted changed conditions that justified modification of these decisions, including Docket No. 192. *Id.*, Findings of Fact, ¶ 8. In the Decision and Order, the Council imposed a number of restrictions and requirements on Towantic related to cleaning operations of fuel pipelines and systems, including limitations on the use of flammable gas.

On April 12, 2012, the Council approved the transfer of the Certificate from Towantic Energy, LLC to CPV Towantic, LLC. *See Council Meeting Minutes, April 12, 2012.*

III. THE COUNCIL HAS THE STATUTORY AUTHORITY TO REOPEN AND MODIFY ITS DECISION IN DOCKET NO. 192

Pursuant to Conn. Gen. Stat. §4-181a(b), the Council has the authority to reopen Docket No. 192 and to modify its Decision due to changes in conditions that have occurred since the Decision was issued on June 23, 1999. Specifically, "[o]n a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion." Conn. Gen. Stat. §4-181a(b). *See Town of Fairfield v. Connecticut Siting Council*, 37 Conn. App. 653, 668 (1995) (Conn. Gen. Stat. §4-181a(b) "gives an agency

Exhibit B

Petition No. 802- Petition for a Declaratory Ruling filed by the Town of Middlebury, Mr. Raymond Pietrorazio, Citizens for the Defense of Oxford, William Stowell, and Mira Schachne (Petitioner) contending that the Connecticut Siting Council actions to extend the Certificate deadline are void in accordance with Conn. Gen. Stat. § 16-50k(c), § 16-50l(d), § 16-50m(b), or § 4-181a(b).	} Connecticut } Siting } Council January 4, 2007

DECISION OF THE STATE OF CONNECTICUT SITING COUNCIL

I. INTRODUCTION

Pursuant to Connecticut General Statutes (Conn. Gen. Stat.) § 4-176, the Town of Middlebury, Mr. Raymond Pietrorazio, Citizens for the Defense of Oxford, Ms. Mira Schachne, and Mr. William Stowell (hereinafter "Petitioners"), represented by Paulann H. Sheets, Esq., filed the instant Petition for Declaratory Ruling (hereinafter "Petition") to the State of Connecticut Siting Council (hereinafter "Council"). The Petition was filed on or about December 7, 2006 and concerns the Council's Decision in Council Docket No. 192, granting a Certificate of Environmental Compatibility and Public Need (hereinafter "Certificate") to Towantic Energy LLC (hereinafter "Towantic") to construct a power plant in the Town of Oxford, Connecticut (hereinafter "Docket No. 192 Decision"). The Council's Docket No. 192 Decision was issued in June of 1999, and contained the following language:

> "Unless otherwise approved by the Council, this Decision and Order shall be void if all construction authorized herein is not completed within four years of the effective date of this Decision and Order or within four years after all appeals to this Decision and Order have been resolved."
>
> *Paragraph 9 of the Decision and Order Section of the Docket No. 192 Decision.*

The Council, relying upon the language "Unless otherwise approved by the Council", extended the construction period of the Certificate multiple times without either amending the Docket No. 192 Decision pursuant to Conn. Gen. Stat. § 16-50k(c) and Conn. Gen. Stat. § 16-50*l*(d), or modifying the decision pursuant to Conn. Gen. Stat. § 4-181a(b), the changed conditions provision. The Petitioners are requesting that the Council rule that its prior extensions are void and that, since the power plant has still not yet been built, the Certificate has expired.

II. DISCUSSION.

There is no language in Chapter 277a of the Connecticut General Statutes (the Public Utility Environmental Standards Act or "PUESA"), the chapter governing the Council, that *expressly* governs the duration of certificates issued by the Council. Conn. Gen. Stat. § 16-50p(a)(1) does, however, state:

> "In a certification proceeding, the council shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate."
>
> Conn. Gen. Stat. § 16-50p(a)(1).

In interpreting statutes, courts will consider the legislative policy the statute was designed to implement. Of course, where the language of the statute is plain and unambiguous, Courts will not

look beyond the statutory language. *Southern New England Telephone Co. v. Department of Public Utility Control*, 64 Conn. App. 134, 138, 779 A.2d 817 (2001), appeal dismissed, 260 Conn. 180, 779 A.2d 294 (2002). The plain language of the statute gives the Council very broad discretion to insert time conditions in its charge to balance environmental concerns with public need and benefit. Clearly, there is no conflict between the legislative policy behind the PUESA as stated in Conn. Gen. Stat. § 16-50g and the plain language of Conn. Gen. Stat. § 16-50p. While we have found no case law interpreting the limits of the above language, the Council believes that granting approvals without time limits may cause havoc with energy and telecommunications infrastructure planning if approved projects languish without limitation. At the same time, to implement its statutory obligations, the Council must have flexibility to evaluate and extend such deadlines without creating a new contested case with subsequent appeals each time an extension is needed. The Council sees nothing in the PUESA or the Uniform Administrative Procedure Act (UAPA) that prohibits the insertion of the language in its decisions that was used in the Docket No. 192 Decision.

The remaining question, then, is whether, by using the phrase, "Unless otherwise approved by the Council", the Council reserved onto itself the power to extend the time limitation short of using the amendment procedure or the changed conditions procedure. While the Petitioners have discussed court cases showing that state agencies have the authority to set time limits on approvals, and have discussed different language used by the Council in various decisions, they have not cited any court cases rejecting an agency reserving onto itself the power to extend a time limit without utilizing the PUESA amendment process or the UAPA changed conditions process. Clearly, had the Council not used the phrase "Unless otherwise approved by the Council", extensions of time could still be obtained through the amendment process or changed conditions process. If, however, even with the phrase "Unless otherwise approved by the Council" in the Docket No. 192 Decision, the only paths to extending the time are through the amendment process or the changed conditions process, then the phrase "Unless otherwise approved by the Council" is mere surplusage, adding no meaning to the Docket No. 192 Decision. In *Vibert v. Board of Education*, 260 Conn. 167, 793 A.2d 1076 (2002), the Connecticut Supreme Court reiterated that in interpreting statutes, "Every word and phrase is presumed to have meaning, and we do not construe statutes so as to render certain words and phrases surplusage." *Id.*, 260 Conn. at 176. Applying this principle to the Docket No 192 Decision, the Council clearly intended to and did reserve onto itself the power to extend the deadline without amending or modifying the Certificate and Decision and Order. The broad language of Conn. Gen. Stat. § 16-50p(a)(1) gives the Council the power to make such a time limit with such a reservation a condition of a certificate.

III. CONCLUSION.

The Council hereby rules, concludes and decides the following: 1) Conn. Gen. Stat. § 16-50p(a)(1) gives the Council the discretion to insert time limits in its approvals; 2) if the Council inserted a time limit without the words, "Unless otherwise approved by the Council", or similar words fulfilling the same function, the amendment procedure of Conn. Gen. Stat. § 16-50k(c) and Conn. Gen. Stat. § 16-50*l*(d), and the changed conditions provisions of Conn. Gen. Stat. § 4-181a(b) are the only means of extending such time limits (unless the reconsideration procedure under Conn. Gen. Stat. § 4-181a(a) is used, which would generally expire before a need for a time extension arose); 3) if the above-cited statutory provisions were the only means of extending the time limits, even with the language "Unless otherwise approved by the Council", the phrase "Unless otherwise approved by the Council" would be meaningless surplusage; 4) by inserting the language "Unless otherwise approved by the Council", the Council intended to be able to extend the time limit contained in the Docket No. 192 Decision without amending or modifying that decision and did so make such reservation; 5) Conn. Gen. Stat. § 16-50p(a)(1) permits such a time limitation with such a reservation to so extend such limitation; and 6) the time extensions rendered by the Council in Docket No. 192 are valid and any extension of the Certificate is likewise valid.

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> *Paragraph 9 of the Decision and Order Section of the Docket No. 192 Decision.*

The Council, relying upon the language "Unless otherwise approved by the Council", extended the construction period of the Certificate multiple times without either amending the Docket No. 192 Decision pursuant to Conn. Gen. Stat. § 16-50k(c) and Conn. Gen. Stat. § 16-50*l*(d), or modifying the decision pursuant to Conn. Gen. Stat. § 4-181a(b), the changed conditions provision. The Petitioners are requesting that the Council rule that its prior extensions are void and that, since the power plant has still not yet been built, the Certificate has expired.

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The remaining question, then, is whether, by using the phrase, "Unless otherwise approved by the Council", the Council reserved onto itself the power to extend the time limitation short of using the amendment procedure or the changed conditions procedure. While the Petitioners have discussed court cases showing that state agencies have the authority to set time limits on approvals, and have discussed different language used by the Council in various decisions, they have not cited any court cases rejecting an agency reserving onto itself the power to extend a time limit without utilizing the PUESA amendment process or the UAPA changed conditions process. Clearly, had the Council not used the phrase "Unless otherwise approved by the Council", extensions of time could still be obtained through the amendment process or changed conditions process. If, however, even with the phrase "Unless otherwise approved by the Council" in the Docket No. 192 Decision, the only paths to extending the time are through the amendment process or the changed conditions process, then the phrase "Unless otherwise approved by the Council" is mere surplusage, adding no meaning to the Docket No. 192 Decision. In *Vibert v. Board of Education*, 260 Conn. 167, 793 A.2d 1076 (2002), the Connecticut Supreme Court reiterated that in interpreting statutes, "Every word and phrase is presumed to have meaning, and we do not construe statutes so as to render certain words and phrases surplusage." *Id.*, 260 Conn. at 176. Applying this principle to the Docket No 192 Decision, the Council clearly intended to and did reserve onto itself the power to extend the deadline without amending or modifying the Certificate and Decision and Order. The broad language of Conn. Gen. Stat. § 16-50p(a)(1) gives the Council the power to make such a time limit with such a reservation a condition of a certificate.

III. CONCLUSION.

The Council hereby rules, concludes and decides the following: 1) Conn. Gen. Stat. § 16-50p(a)(1) gives the Council the discretion to insert time limits in its approvals; 2) if the Council inserted a time limit without the words, "Unless otherwise approved by the Council", or similar words fulfilling the same function, the amendment procedure of Conn. Gen. Stat. § 16-50k(c) and Conn. Gen. Stat. § 16-50*l*(d), and the changed conditions provisions of Conn. Gen. Stat. § 4-181a(b) are the only means of extending such time limits (unless the reconsideration procedure under Conn. Gen. Stat. § 4-181a(a) is used, which would generally expire before a need for a time extension arose); 3) if the above-cited statutory provisions were the only means of extending the time limits, even with the language "Unless otherwise approved by the Council", the phrase "Unless otherwise approved by the Council" would be meaningless surplusage; 4) by inserting the language "Unless otherwise approved by the Council", the Council intended to be able to extend the time limit contained in the Docket No. 192 Decision without amending or modifying that decision and did so make such reservation; 5) Conn. Gen. Stat. § 16-50p(a)(1) permits such a time limitation with such a reservation to so extend such limitation; and 6) the time extensions rendered by the Council in Docket No. 192 are valid and any extension of the Certificate is likewise valid.

Exhibit C

Town of Middlebury et al.

v.

Connecticut Siting Counsel et al.

HHB CV 07-4013143

Superior Court of Connecticut, New Britain

November 1, 2007

Caption Date: October 29, 2007

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Schuman, Carl J., J.

Opinion Title: Memorandum of Decision

The plaintiffs, who consist of the town of Middlebury, a citizens group, and three individuals, appeal from the decision of the Connecticut Siting Council (council) on their petition for a declaratory ruling concerning the authority of the council to grant extensions of time to complete the construction of a power plant without complying with the statutes governing amendments of the power plant's certificate of environmental compatibility and public need (certificate). The council ruled, based on the wording of the certificate that it issued in this case, that its extensions of the time limits for completion did not constitute amendments of the certificate within the meaning of the applicable statutes. The court agrees and accordingly dismisses this appeal.

I

The record establishes that there have been two prior appeals in this case. On June 23, 1999, the council granted the application of Towantic Energy, LLC (Towantic) for a certificate for the construction and operation of an electric generating facility to be located in the town of Oxford. Plaintiff Citizens for the Defense of Oxford (Citizens) appealed the granting of the certificate. The Superior Court dismissed the appeal in 2000. Citizens for the Defense of Oxford v. Connecticut Siting Council, Superior Court, judicial district of Hartford-New Britain at New Britain, Docket No. CV 99-0497075 (November 14, 2000, Satter, J.T.R.). At about the same time, plaintiffs Citizens, the town of Middlebury, William Stowell, and Mira Schachne filed a petition for a declaratory ruling with the council concerning Towantic's then-recently filed development plan. From the council's decision in this matter, these plaintiffs appealed to the Superior Court, which dismissed the appeal in February 2002. Town of Middlebury v. Connecticut Siting Council, Superior Court, judicial district of New Britain, Docket No. CV 01-0508047 (February 27, 2002, Cohn, J.).

Paragraph 9 of the "Decision and Order" section of the original certificate in this case provides as follows: "Unless otherwise approved by the Council, this Decision and Order shall be void if all construction authorized herein is not completed within four years of the effective date of this Decision and Order or within four years after all appeals to this Decision and Order have been resolved." Beginning in March 2004, and after the above-described appeals had run their course, the council extended the deadline for completion of the construction four times. The current extension is to January 24, 2011.

In December 2006, the four plaintiffs named above, along with the fifth plaintiff here, Raymond Pietrorazio, filed a petition for a declaratory ruling seeking an adjudication that the council had no authority to extend the completion date without formally amending or modifying the certificate.[1] On January 4, 2007, the council issued its decision. The essence of that decision was the council's conclusion that it "clearly intended to and did reserve onto itself the power to extend the deadline without amending or modifying the Certificate and Decision and Order," The plaintiffs have appealed. The defendants are the council, Towantic, and General Electric Energy Financial Services, Inc., which is a potential buyer of Towantic.

II

General Statutes §4-176(a) provides that "[a]ny person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency." Subsection (h) of the statute provides in relevant part that "[a] declaratory ruling. shall be a final decision for purposes of appeal in accordance with the provisions of section 4-183." As applicable here, §4-183(a) states: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section." The plaintiffs have appealed pursuant to this authority.[2]

The defendants raise several procedural objections to this appeal. The principal one is that the plaintiffs should have raised the issue of the authority of the council to extend deadlines in the earlier administrative appeals in this case and that the doctrine of res judicata prevents them from doing so now. The court disagrees. From 1999 to 2002, at the time of the earlier administrative appeals, the issue of extension of the deadlines had not arisen. Nor was it reasonably foreseeable. The plaintiffs would have had to overcome a legitimate defense of ripeness. The plaintiffs, therefore, did not have an adequate opportunity to litigate this matter previously and thus are not precluded by res judicata. See Daoust v. McWilliams, 49 Conn.App. 715, 723-24, 716 A.2d 922 (1998).

The court also rejects the other procedural defenses raised by the defendants. The court finds, based on the testimony at the hearing, that the town of Middlebury is aggrieved. Accord Town of Middlebury v. Connecticut Siting Council, supra, Superior Court, Docket No. CV 010508047. See also General Statutes §16-50l(b)(1) (town within two thousand five hundred feet of facility is entitled to notice). Accordingly, it is not necessary to determine whether the other plaintiffs are aggrieved. See Protect Hamden/North Haven from Excessive Traffic and Pollution, Inc. v. Planning and Zoning Commission, 220 Conn. 527, 529 n.3, 600 A.2d 757 (1991). Contrary to the defendants' claim, the plaintiffs have exhausted their administrative remedies in that they objected by letter to the first two extensions of the deadline and then filed the petition for a declaratory ruling during the pendency of the third extension. Finally, the case fits within the contours of a declaratory ruling because it involves "the applicability to specified circumstances of . . . a final decision on a matter within the jurisdiction of the agency." General Statutes §4-176(a). Accordingly, the court proceeds to the merits.

III

Chapter 277a of the General Statutes, which includes General Statutes §§16-50g to 16-50ee, contains the Public Utilities Environmental Standards Act (PUESA or the act). Among the purposes of PUESA is "[t]o provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values . . ." General Statutes §16-50g. The act creates the council within the department of public utility control. General Statutes §16-50j(a). It provides, with exceptions not pertinent here, that "[n]o person shall exercise the power of eminent domain in contemplation of, commence the preparation of the site for, or commence the construction or supplying of a facility, or commence any modification of a facility, that may, as determined by the council, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need, hereinafter referred to as a 'certificate,' issued with respect to such facility or modification by the council . . ." General Statutes §16-50k (a).[3]

General Statutes 16-50p(a)(1) provides: "In a certification proceeding, the council shall render a decision upon

the record either granting or denying the application as filed, or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate." The principal question in this case is whether a deadline to complete construction that can be extended by the council is the type of "condition" contemplated by this statute or, alternatively, whether the council can only extend the deadline by invoking the statutory procedures for amendment of the certificate. This question is one of law involving statutory construction. Because, as the plaintiffs have demonstrated, there is no significant prior history of the council or the courts determining the legal issue as the council did in its declaratory ruling, the court does not grant the traditional deference to the agency's most recent interpretation. See Celentano v. Rocque, 282 Conn. 645, 653, 923 A.2d 709 (2007). Instead, the court reviews the issue de novo.

IV

It is clear that the council believed in this case that the creation of a flexible deadline – one that it could postpone if necessary – was one of the "conditions [that it deemed] appropriate." General Statutes §16-50p(a)(1). Paragraph 9 of the decision and order section of the certificate addresses only the deadline for completion of the construction. It does not refer to any other aspect of the project. Thus, the introductory language "[u]nless otherwise approved" in paragraph 9 necessarily reveals the council's intent to exercise the authority to approve a different deadline than the one originally set. Indeed, the council stated in its decision that it "clearly intended to and did reserve onto itself the power to extend the deadline without amending or modifying the Certificate and Decision and Order."

Because the council thus granted the extensions in accordance with the conditions in the certificate, and did not change the certificate in any way, it is hard to see how the council's actions could be deemed an "amendment" of the certificate. The plaintiffs nonetheless claim that, in order for the council to extend a deadline to complete construction, the council must amend the certificate pursuant to the act's amendment procedures.[4] General Statutes §16-50k[c] provides that "[a] certificate issued pursuant to this chapter may be amended as provided in this chapter." Sections 16-50l through 16-50p set forth the amendment procedures. For example, §16-50m(b) governs whether and when to hold a hearing on a proposed amendment. Section 16-50p(e) addresses the deadlines and components of the requisite written decision. See also General Statutes §16-50l(d) (applications for amendments); §16-50n(a) and (b) (parties to an amendment proceeding); §16-50o (record of hearing).

The court does not agree that an extension of the deadline in the certificate to complete construction must go through this amendment process. To begin with, the wording of §16-50p(a)(1) conferring on the council to grant certificates upon such conditions "as the council may deem appropriate" suggests the broadest possible delegation of power to the council to set conditions in the certificate without use of the amendment process. The Appellate Court has held under this statute that courts should "not substitute [their] judgment for that of the council regarding the adequacy and reasonableness of the condition." Preston v. Connecticut Siting Council, 20 Conn.App. 474, 491, 568 A.2d 799, cert. denied, 214 Conn. 803, 573 A.2d 316 (1990). In this case, a condition of a flexible deadline – one that would not require resort to the amendment process – seems to fit well within the parameters of the type of a condition that the council "may deem appropriate." As the council noted in its decision, the absence of "time limits may cause havoc with energy and telecommunications planning" but there is concomitant need for "flexibility to evaluate and extend such deadlines . . ."

A review of the statutes reveals that the primary, if not the sole, purpose of the amendment process is to address the need of a certificate for "modification," which the statutes define as "a significant change or alteration in the general physical characteristics of a facility . . ." (Emphasis added.) General Statutes §16-50l(d). Under §16-50l(d), either the certificate holder, pursuant to an application, or the council, pursuant to a resolution, may initiate the amendment process. If the council initiates the amendment pursuant to resolution, it "shall identify the design, location or route of the portion of a certificated facility described in subdivisions (1) or (2) of subsection (a) of section 16-50i which is subject to modification . . ." (Emphasis added.)[5] The same section further provides that "[n]o such resolution for amendment of a certificate shall be adopted after the commencement of site preparation or construction of the certificated facility or, in the case of a facility for which approval by the council of a right-of-way development and management plan or other detailed construction plan is a condition of a certificate, after approval of that part of the plan which includes the portion of that facility proposed for modification." (Emphasis added.) Finally, §16-50l(d) requires the certificate holder and the council to provide notice and copies of the application or resolution for amendment in accordance with other statutory procedures, but qualifies this obligation as follows: "The certificate holder and the council shall not be required to give such copy and notice to municipalities and the commissions and agencies of such municipalities other than those in which the modified portion of the facility would be located." (Emphasis added.)

Section 16-50m governs public hearing procedures. Among other things, subsection (a) addresses the location of public hearings, some of which are to take place in the county or counties in which the activity is to occur. Subsection (b) specifically applies to the timing and location of hearings on an application for an amendment. It provides: "[t]he county in which the facility is deemed to be located for purposes of a hearing under this subsection shall be the county in which the portion of the facility proposed for modification is located." (Emphasis added.) General Statutes §16-50m(b).

Thus, these statutes contemplate that certificate amendment proceedings will involve "modifications," which our statutes define as an alteration in the physical characteristics of a facility. There is nothing in the statutes that provides for amendments due to the need to extend the deadline to complete a project. Nor is there anything that negates the ability of the council to make a flexible deadline a "condition" of a certificate under §16-50p(a) rather than a matter for amendment. Indeed, because the council apparently has the greater power to issue a certificate with no deadline at all, it surely has the lesser power to issue a certificate based on the condition that the applicant complete the project by a certain deadline "unless otherwise approved by the Council." See Bottone v. Westport, 209 Conn. 652, 671, 553 A.2d 576 (1989).

V

The plaintiffs not having sustained their burden, the appeal is dismissed.

It is so ordered.

Carl J. Schuman

Judge, Superior Court

Footnotes:

[1]. Between December 2005, and January 2007, the council conducted proceedings to determine whether conditions had changed so that it should modify or reverse its original decision. The council ultimately decided that no modification or reversal was necessary. These proceedings are not directly in issue in this appeal.

[2]. Also applicable is General Statutes §16-50q, which provides: "Any party may obtain judicial review of an order issued on an application for a certificate or an amendment of a certificate in accordance with the provisions of section 4-183. Any judicial review sought pursuant to this chapter shall be privileged in respect to assignment for trial in the Superior Court."

[3]. A "facility" includes an electric transmission line, a fuel transmission facility, any electric generating or storage facility, any electric substation or switchyard, certain community antenna television towers, and certain telecommunication towers. See General Statutes §16-50i(a).

[4]. The plaintiffs do not brief their claim that the council failed to "modify" the certificate or otherwise comply with the changed conditions procedures of the Uniform Administrative Procedure Act (UAPA). See General Statutes §4-181a(b). The court therefore considers this claim abandoned. See Merchant v. State Ethics Commission, 53 Conn.App. 808, 818, 733 A.2d 287 (1999).

[5]. Section 16-50i(a)(1) and (2) refers generally to electric transmission lines and fuel transmission facilities. Under §16-50l, there is no similar qualification for an application for an amendment from a certificate holder.

